

COMMISSIONERS
MIKE GLEASON - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE



ARIZONA CORPORATION COMMISSION

DATE: NOVEMBER 9, 2007

DOCKET NOS: T-03943A-07-0205, T-04112A-07-0205 and T-04113A-07-0205

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Belinda Martin. The recommendation has been filed in the form of an Order on:

TIME WARNER TELECOM OF ARIZONA, LLC, XSPEDIUS MANAGEMENT CO.
SWITCHED SERVICES, LLC and XSPEDIUS MANAGEMENT CO. FOR PIMA
COUNTY
(TRANSFER ASSETS/CANCEL CC&N)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

NOVEMBER 19, 2007

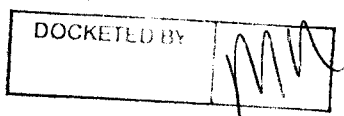
The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

NOVEMBER 27, 2007 and NOVEMBER 28, 2007

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

Arizona Corporation Commission
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BRIAN C. McNEIL
EXECUTIVE DIRECTOR

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2 **BEFORE THE ARIZONA CORPORATION COMMISSION**

3 COMMISSIONERS

4 MIKE GLEASON, Chairman
5 WILLIAM A. MUNDELL
6 JEFF HATCH-MILLER
7 KRISTIN K. MAYES
8 GARY PIERCE

9 IN THE MATTER OF THE JOINT APPLICATION
10 OF TIME WARNER TELECOM OF ARIZONA,
11 LLC, XSPEDIUS MANAGEMENT CO.
12 SWITCHED SERVICES, LLC, AND XSPEDIUS
13 MANAGEMENT CO. FOR PIMA COUNTY, LLC,
14 FOR APPROVAL OF THE TRANSFER OF
15 ASSETS, CANCELLATION OF THE
16 CERTIFICATES OF CONVENIENCE AND
17 NECESSITY AND FOR ELIMINATION OF
18 PERFORMANCE BOND.

DOCKET NO. T-03943A-07-0205
DOCKET NO. T-04112A-07-0205
DOCKET NO. T-04113A-07-0205

DECISION NO. _____

ORDER

13 Open Meeting
14 November 27 and 28, 2007
15 Phoenix, Arizona

16 **BY THE COMMISSION:**

17 Having considered the entire record herein and being fully advised in the premises, the
18 Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

19 **FINDINGS OF FACT**

20 1. On March 30, 2007, Time Warner Telecom of Arizona, LLC ("TWTA"), Xspedius
21 Management Co. Switched Services, LLC, and Xspedius Management Co. for Pima County, LLC
22 (jointly, "Xspedius Certified Subsidiaries," and together with TWTA, the "Applicants" or
"Companies"), filed an application (the "Application") requesting the following:

- 23 • Approval of the transfer of assets from the Xspedius Certified Subsidiaries
24 to TWTA;
- 25 • Cancellation of the Certificates of Convenience and Necessity ("CC&Ns")
26 held by the Xspedius Certified Subsidiaries; and
- 27 • Elimination of the performance bonds currently imposed by the
28 Commission on the Applicants, totaling \$2.17 million.

2. On May 30, 2007, the Applicants filed a Supplement to Application and Notice of
Filing of Affidavit of Publication certifying that Notice was published in the *Arizona Republic* on

1 April 30, 2007.

2 3. On June 22, 2007, the Applicants filed their Second Supplement to Application for
3 Authorization to Transfer Assets, requesting a waiver of Arizona Administrative Code ("A.A.C.")
4 R14-2-2001, *et seq.*, and R14-2-1901, *et seq.* (the "Slamming and Cramming Rules").

5 4. On August 10, 2007, the Commission's Utilities Division Staff ("Staff") filed its Staff
6 Report recommending approval of the Application as supplemented, subject to certain terms and
7 conditions.

8 5. On October 5, 2007, Staff filed an Amended Staff Report which included Exhibits D
9 and E.

10 6. The Applicants did not file objections to the Staff Reports.

11 **THE PARTIES**

12 7. Time Warner Telecom, Inc. ("Time Warner Telecom") is the current parent
13 corporation of the Companies. Incorporated in Delaware and headquartered in Littleton, Colorado,
14 Time Warner Telecom is authorized to provide intrastate interexchange and competitive local
15 exchange services in thirty-three states, Washington, D.C. and federal interstate jurisdiction.

16 8. TWTA provides broadband data, voice, dedicated internet access and dedicated web
17 hosting services to business customers in the Phoenix and Tucson metropolitan areas. TWTA entered
18 the Phoenix and Tucson markets by purchasing out of bankruptcy substantially all of the assets of
19 GST-AZ Net, Inc., which purchase and CC&N transfer were approved by the Commission on
20 December 14, 2000, pursuant to Decision No. 63262. Under that Decision, the Commission granted
21 TWTA the authority to provide competitive local exchange and interexchange telecommunications
22 services in Arizona.

23 9. The Xspedius Certified Subsidiaries are limited liability companies formed under the
24 laws of Delaware. The Xspedius Certified Subsidiaries are authorized in Arizona to provide
25 competitive facilities-based and resold local exchange and exchange access telecommunications
26 services in Arizona pursuant to Decision No. 65124, dated August 23, 2002. The Xspedius Certified
27 Subsidiaries provide local, long distance, integrated and internet access solutions to small and
28 medium-sized business customers, but do not provide service to residential customers.

1 10. On September 21, 2006, in Decision No. 68958, the Commission approved Time
2 Warner Telecom's acquisition of the assets of Xspedius Communications, LLC, which at that time
3 was the parent company of the Xspedius Certified Subsidiaries.

4 11. Time Warner Telecom, through TWTA and the Xspedius Certified Subsidiaries,
5 serves only Arizona business customers.

6 **TRANSFER OF ASSETS**

7 12. In the Application, the Companies first seek to transfer the assets and customers of the
8 Xspedius Certified Subsidiaries to TWTA. Upon transfer, Time Warner Telecom will remain the
9 ultimate corporate parent and it will have only one subsidiary operating in Arizona — TWTA.
10 Attached to the Staff Report as Exhibit "A" is a pre-consolidation company chart and attached as
11 Exhibit "B" is a proposed post-consolidation company chart. The proposed consolidation is not
12 expected to result in any loss or impairment of services to the Applicants' customers.

13 13. The Companies assert that the proposed internal consolidation will simplify Time
14 Warner Telecom's corporate structure, streamline its Arizona operations, eliminate administrative
15 redundancy and improve overall efficiency.

16 14. After the consolidation, TWTA will provide the same services to the Companies'
17 customers as was provided prior to the completion of the consolidation.

18 15. On October 16, 2006, TWTA sent a notice to Xspedius Certified Subsidiaries
19 customers describing the merger and assuring customers that they will continue to receive the same
20 telecommunications services they are currently receiving in accordance with the rates, terms and
21 conditions of their existing contracts or under the effective tariffs. The Notices are attached to the
22 Staff Report as Exhibits "D" and "E."

23 16. TWTA states that it will provide another written notice to customers of the Xspedius
24 Certified Subsidiaries explaining the asset consolidation, TWTA's plan for incorporating Xspedius
25 products and services into its tariff and advising customers that they have the option of selecting a
26 new service provider if they do not wish to be a TWTA customer.

27 17. In accordance with A.A.C. R14-2-1107, the Companies published legal notice of the
28 Application in the April 30, 2007 *Arizona Republic*, and on May 30, 2007, the Companies filed an

1 Affidavit of Publication with the Commission.

2 **CANCELLATION OF CC&Ns**

3 18. If the transfer of assets is approved by the Commission, the Companies request that
4 the CC&Ns held by the Xspedius Certified Subsidiaries be cancelled. The customers' service will be
5 provided by TWTA, which has authority to provide competitive local exchange and interexchange
6 telecommunications services in Arizona pursuant to Decision No. 63262, dated December 14, 2000,
7 making a transfer of the Xspedius Certified Subsidiaries' CC&Ns to TWTA unnecessary.

8 19. The Companies assert that the customers of the Xspedius Certified Subsidiaries will
9 not experience any change in their rates or services, nor will any service contracts be terminated as a
10 result of the consolidation. Further, TWTA will revise the TWTA tariff to incorporate the terms and
11 conditions of service included in the Xspedius Certified Subsidiaries' tariffs.

12 20. TWTA and the Xspedius Certified Subsidiaries expect that the transfer of assets will
13 be transparent to the customers.

14 21. Pursuant to A.A.C. R14-2-1107, the Companies provided in the Application a list of
15 alternative utilities providing local and interexchange services in the two Xspedius Certified
16 Subsidiaries' service areas, and the list is attached to the Staff Report as Exhibit "C."

17 **ELIMINATION OF PERFORMANCE BONDS**

18 22. A.A.C. R14-2-1105(D) states, "In appropriate circumstances, the Commission may
19 require, as a precondition to certification, the procurement of a performance bond sufficient to cover
20 any advances or deposits the telecommunications company may collect from its customers...."

21 23. The Commission has adopted a policy of requiring telecommunications companies to
22 obtain a performance bond or irrevocable sight draft letter of credit ("ISDLOC") depending upon the
23 type of service provided. The purpose of these bonds/ISDLOCs is to protect the public in the event of
24 a default of the service provider. Potential losses or damages for customers would include loss of
25 pre-payments and advances by the customer; loss of monthly service that has been paid in advance by
26 the customer; and costs to the customer for physical equipment changes required by default of the
27 provider.

28

1 24. The Companies currently hold bonds totaling \$2.17 million.¹ TWTA presently has a
 2 \$1.7 million performance bond as required by Decision No. 67108. Xspedius Management Co. of
 3 Pima County, LLC, maintains a \$235,000 performance bond and Xspedius Management Co.
 4 Switched Services, LLC, maintains a \$235,000 performance bond, both pursuant to Decision No.
 5 65124. The Companies seek to eliminate the required performance bonds.

6 25. TWTA indicated in the Application that it maintains deposits totaling less than
 7 \$100,000, and the Xspedius Certified Subsidiaries maintain combined deposits of less than \$10,000.

8 26. Pursuant to A.A.C. R14-2-1107, the Applicants provided to Staff a plan to refund
 9 customer deposits should the affected customers decide to switch service providers.

10 27. The Companies argue that a performance bond is unnecessary because, as a facilities-
 11 based competitive local exchange carrier ("CLEC"), they are heavily invested in Arizona and, should
 12 they face bankruptcy, they will likely reorganize and emerge from bankruptcy with no financial
 13 impact on their customers. "Indeed, customer deposits and advances are no more at risk with an
 14 established, facilities-based CLEC like Time Warner Telecom than they are with Qwest, Cox, or
 15 Sprint—all of which operate in competition with facilities-based CLECs but carry no performance
 16 bonds." (*Application*, page 12). Further, the Companies stated that they have provided service to
 17 Arizona business customers for over seven years and are solidly established and invested in Arizona
 18 and have a well-established operating history. Therefore, the Companies assert, that elimination of
 19 performance bond requirements is warranted.

20 28. In response to the Companies' request to eliminate the \$2.17 million in bonds, Staff
 21 considered the Commission's current performance bond/ISDLOC policy; the services that TWTA
 22 will be providing in Arizona; the amount of customer deposits currently held; the amount of financial
 23 investment in Arizona; and Commission Decision No. 67460 (January 4, 2005) in which XO
 24 Communications, Inc. was allowed to reduce its performance bond. Based upon this analysis, Staff
 25 recommends that a reduction in the performance bond, as opposed to elimination of the bond, is
 26 appropriate. The Commission's current performance bond/ISDLOC requirements are \$10,000 for
 27

28 ¹ TWTA also has pending Docket No. T-03943A-04-0909, in which it seeks to reduce its performance bond requirements. Staff recommends administrative closure of Docket No. T-03943A-04-0909 upon a Decision in the instant matter.

1 resold long distance, \$25,000 for resold local exchange, \$100,000 for facilities-based long distance,
2 and \$100,000 for facilities-based local exchange services. Therefore, TWTA should file a
3 performance bond or irrevocable sight draft letter of credit in the amount of \$235,000.

4 29. The Companies did not file objections to Staff's recommendation to reduce, but not
5 eliminate the required bond/ISDLOC amount.

6 30. Although pursuant to A.A.C. R14-2-1105(D) a bond is not required in every
7 circumstance, with applications to provide certain telecommunications services, the Commission has
8 established a clear policy to protect customers in the event of a default by a service provider,
9 especially when customers potentially could be without service. Therefore, we find that Staff's
10 recommendation for a reduction in TWTA's bond, rather than elimination of the bond, is reasonable.

11 **WAIVER OF SLAMMING AND CRAMMING RULES**

12 31. In their Second Supplement to Application, the Applicants request waiver of the
13 Slamming and Cramming Rules, which prohibit unauthorized change to a customer's carrier selection
14 and prohibit unauthorized charges on a customer's bill.

15 32. On October 16, 2006, TWTA provided notice to the customers of the Xspedius
16 Certified Subsidiaries describing the merger and assuring customers that they would continue to
17 receive the same telecommunications services they are currently receiving in accordance with the
18 rates, terms and conditions of their existing contracts or effective tariffs.

19 33. TWTA expects to send another written notice to all Xspedius Certified Subsidiaries'
20 customers explaining the asset consolidation, TWTA's plan for incorporating Xspedius products and
21 services into its tariff and advising customers that they have the option of selecting a new service
22 provider if they do not wish to become a TWTA customer.

23 34. Staff reviewed the customer notification letter already provided to customers by
24 TWTA as well as the letter that will be provided to customers of the Xspedius Certified Subsidiaries
25 upon consolidation. Because the notices inform customers that the rates, terms and conditions of
26 service will not change as a result of this asset transfer and informs customers that they may
27 subscribe to the telecommunications service provider of their choice, Staff asserts that the Slamming
28 and Cramming Rules, A.A.C. R14-2-2001 – 2007 and A.A.C. R14-2-1901 – 1913, should be waived

1 in this matter.

2 **PUBLIC INTEREST CONSIDERATIONS**

3 35. The Companies assert that granting their Application would serve the public interest
4 because the transaction will be transparent to, and have no adverse impact on, the Companies'
5 customers. Customers will be subject to the same rates, terms and conditions as they were prior to
6 any asset transfer.

7 36. Further, the Companies allege that the proposed consolidation will reduce legal,
8 accounting and tax administrative burdens and will simplify Time Warner Telecom's corporate
9 structure, eliminate administrative redundancy and improve the organization's overall efficiency.

10 37. The consolidation will not cause any meaningful change in the ownership or financial
11 condition of TWTA.

12 38. The Applicants state that as of April 27, 2007, there are sixty-one people employed in
13 their Phoenix and Tucson offices. TWTA does not anticipate any Arizona workforce layoffs or plant
14 closures as a result of the consolidation.

15 39. According to the Corporations Division of the Commission, the Companies are in
16 good standing. Consumer Services reports zero complaints against TWTA and Xspedius
17 Management Co. Switched Services, LLC, but Xspedius Management Co. of Pima County, LLC, had
18 twelve complaints from January 1, 2003, through April 13, 2007, all of which have been resolved and
19 closed. Also, the Companies are current in filing their 2006 Annual Report. Finally, the Companies
20 are current with their compliance requirements under their respective CC&Ns.

21 **STAFF RECOMMENDATIONS**

22 40. Staff recommends approval of the transfer of assets, including customers, of the
23 Xspedius Certified Subsidiaries to TWTA.

24 41. Staff recommends cancellation of the Xspedius Certified Subsidiaries' CC&Ns to
25 provide telecommunications services in Arizona.

26 42. Staff further recommends that the requirement for each of the \$235,000 performance
27 bonds currently held by Xspedius Management Co. of Pima County, LLC, and Xspedius
28 Management Co. Switched Services, LLC, pursuant to Decision No. 65124, be eliminated.

1 43. In addition, Staff recommends that the requirement for the \$1.7 million performance
2 bond currently held by TWTA be reduced to a \$235,000 performance bond or irrevocable sight draft
3 letter of credit.

4 44. Staff recommends approval of the Applicants' request for a waiver of the Slamming
5 and Cramming Rules.

6 45. Staff further recommends that TWTA be ordered to comply with the following:

7 (a) Retain a performance bond or irrevocable sight draft letter of credit in the
8 amount of \$235,000. The minimum bond or draft amount of \$235,000 should be
9 increased if at any time it would be insufficient to cover advances, deposits, and/or
10 prepayments collected from TWTA's customers. The bond or draft amount should be
11 increased in increments of \$117,500. This increase should occur when the total
amount of the advances, deposits, and prepayments is within \$23,500 of the bond or
draft amount;

12 (b) Docket proof of the performance bond or irrevocable sight draft letter of credit
13 within 60 days of the effective date of a Decision in this matter as a compliance item
14 in this docket. The performance bond or irrevocable sight draft letter of credit must
remain in effect until further order of the Commission;

15 (c) Docket proof that the Arizona customers of the Xspedius Certified Subsidiaries
16 received notification that they may elect, within 90 days of receiving the notice, to
17 continue or discontinue service with TWTA, without prejudice or regard to contractual
obligation;

18 (d) Provide written confirmation to Staff that all funds held as prepayments,
19 deposits, or advances have been refunded or credited to customers of the Xspedius
Certified Subsidiaries who want to discontinue service with TWTA;

20 (e) Provide written confirmation to Staff that transfer of the Xspedius Certified
21 Subsidiaries assets into TWTA occurred and that the Xspedius Certified Subsidiaries'
22 CC&Ns have been cancelled by the Commission. By providing Staff with
23 documentation that the transfer of assets has been completed, the Xspedius Certified
Subsidiaries will no longer be responsible for the requirements of Decision No. 65124;
and,

24 (f) File revised TWTA conforming tariffs within 60 days of the effective date of a
25 Decision in this matter to incorporate the terms and conditions of service included in
the Xspedius Certified Subsidiaries' tariffs.

26 46. Staff's recommendations in Finding of Fact Nos. 40, 41, 42, 43, 44 and 45 are
27 reasonable.

28 ...

CONCLUSIONS OF LAW

1. Applicants are public service corporations within the meaning of Article XV of the Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

2. The Commission has jurisdiction over Applicants and the subject matter of the Application.

3. Notice of the Application was given in accordance with Arizona law.

4. Transfer of the Xspedius Certified Subsidiaries' assets, including customers, is in the public interest.

5. Cancellation of the Xspedius Certified Subsidiaries' CC&Ns is in the public interest.

6. Reduction of TWTA's \$1.7 million performance bond to \$235,000 and elimination of each of the Xspedius Certified Subsidiaries' \$235,000 performance bonds are in the public interest.

7. Waiver of A.A.C. R14-2-2001 – 2007 and A.A.C. R14-2-1901 – 1913 is reasonable.

8. Staff's recommendations in Finding of Fact Nos. 40, 41, 42, 43, 44 and 45 are reasonable and should be adopted.

ORDER

IT IS THEREFORE ORDERED that the Application of Time Warner Telecom of Arizona, LLC, Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Pima County, LLC, for (1) authorization to transfer assets; (2) cancellation of CC&Ns; (3) elimination of performance bonds for Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Pima County, LLC; and (4) waiver of A.A.C. R14-2-2001, *et seq.*, and R14-2-1901, *et seq.*, shall be, and hereby is, granted, conditioned upon compliance with the requirements set forth in Finding of Fact Nos. 45, above.

IT IS FURTHER ORDERED that Decision No. 67108's requirement to maintain a \$1.7 million performance bond is modified to require a performance bond or irrevocable sight draft letter of credit in the amount \$235,000 which shall remain in effect until further Order of the Commission, and Time Warner Telecom of Arizona, LLC is authorized to eliminate its existing \$1.7 million performance bond.

IT IS FURTHER ORDERED that Time Warner Telecom of Arizona, LLC shall increase the

1 minimum performance bond or irrevocable sight draft letter of credit amount of \$235,000 if at any
2 time it would be insufficient to cover advances, deposits and/or prepayments collected from Time
3 Warner Telecom of Arizona, LLC's, customers. The performance bond or irrevocable sight draft
4 letter of credit should be increased in increments of \$117,500, and the increase should occur when the
5 total amount of the advances, deposits and/or prepayments is within \$23,500 of the performance bond
6 or irrevocable sight draft letter of credit amount.

7 IT IS FURTHER ORDERED that Time Warner Telecom of Arizona, LLC shall file the new
8 original performance bond or original irrevocable sight draft letter of credit, in a form acceptable to
9 Staff, with the Commission's Business Office and copies of the performance bond or irrevocable
10 sight draft letter of credit with Docket Control, as a compliance item in this docket, within 60 days of
11 the effective date of this Decision.

12 IT IS FURTHER ORDERED that Staff's recommendations set forth in Finding of Fact Nos.
13 40, 41, 42, 43, 44 and 45, above, are hereby adopted.

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1 IT IS FURTHER ORDERED that failure by Time Warner Telecom of Arizona, LLC,
2 Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Pima County,
3 LLC, to comply with Staff's recommendations within the specified time frames as set forth in
4 Finding of Fact No. 45 (a)-(c) and (f) above, will render this Decision null and void without further
5 action of the Commission unless the Commission grants an extension of time for compliance with
6 those requirements.

7 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

8 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
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11 CHAIRMAN

COMMISSIONER

12
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14 COMMISSIONER

COMMISSIONER

COMMISSIONER

15
16 IN WITNESS WHEREOF, I, DEAN S. MILLER, Interim
17 Executive Director of the Arizona Corporation Commission,
18 have hereunto set my hand and caused the official seal of the
19 Commission to be affixed at the Capitol, in the City of Phoenix,
20 this ____ day of _____, 2007.

21 DEAN S. MILLER
22 INTERIM EXECUTIVE DIRECTOR

23
24 DISSENT _____

25
26 DISSENT _____
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28

1 SERVICE LIST FOR:

TIME WARNER TELECOM, OF ARIZONA, LLC,
XSPEDIUS MANAGEMENT CO. SWITCHED
SERVICES, LLC, AND XSPEDIUS MANAGEMENT
CO. FOR PIMA COUNTY, LLC

4 DOCKET NOS.:

T-03943-07-0205, T-04112A-07-0205, and T-04113A-
07-0205

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